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THE INTERNAL REVENUE RESTRUCTURING AND REFORM ACT OF 1998: DOES IT REALLY SHIFT THE BURDEN OF PROOF TO THE IRS?

INTRODUCTION

On July 22, 1998, President William Jefferson Clinton signed legislation which purported to make massive changes to the inner workings of the Internal Revenue Service and which was lauded as profoundly changing the manner in which taxpayers defend attacks of asserted deficiencies.¹ At first glance, taxpayers

¹ See 26 U.S.C. § 7491. The operative language of the statute is as follows:
§7491 Burden of Proof

(a)Burden shifts where taxpayer produces credible evidence —

(1)General rule. — If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer or any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

(2)Limitations.—paragraph (1) shall apply with respect to an issue only if

(A)the taxpayer has complied with the requirements under this title to substantiate any item;

(B)the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews; and

(C)in the case of a partnership, corporation, or trust, the taxpayer is described in section 7430(c)(4)(A)(ii).

(3)Coordination.—Paragraph (1) shall not apply to any issue if any other provision of this title provides for a specific burden of proof with respect to such issue.

(b)Use of statistical information on unrelated taxpayers.—in case of an individual taxpayer, the Secretary shall have the burden of proof in any court proceeding with respect to any item of income which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers.

(c)Penalties. — notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.

Added Pub. L. 105-206, Title III, §3001(a), July 22, 1998, 112 Stat. 726; see also <http://davidbonior.house.gov/news/press/072298_irs_reform.html> (visited Jan. 5, 1999). This states bill was signed into law on July 22, 1998 and it will provide taxpayer with protections. See <<http://www.aicpa.org/belt/news.html>> (visited Jan. 23, 1999). This notes that the signing of this bill into law on July 22, 1998 of P.L. 105-206 was a “victory” for taxpayers. See Ryan J. Donmoyer, *With the Stroke of Six Pens, IRS Reform Became Law*

seemed to benefit enormously from the passage of Section 7491 of the Internal Revenue Code, and its changes were applauded as highly pro-taxpayer in the Senate hearings.² A closer look at the effects and results of this legislation, however, reveals the changes were not as broad or as advantageous as anticipated, particularly when applied to the individual taxpayer. In fact, individual taxpayers may actually be further burdened by the new law through overly intrusive requests for cooperation by the IRS. Part I will examine the new requirements. Part II will provide a general look into the history of the burden of proof in tax cases and will examine the legislative history of Section 7491. Part III will discuss the implications of its failure to truly assist the individual taxpayer. Part IV will review public opinion regarding the new provision and conclude that further revisions are necessary.

I. THE NEW PROVISION

The purpose of the Internal Revenue Restructuring and Reform Act of 1998 was "to amend the Internal Revenue Code of 1986 [so as] to restructure and reform the Internal Revenue Service."³ The section 7491 amendment provided a seemingly drastic change in the procedure of dealing with the Internal Revenue Service by purportedly shifting the burden of proof from

Last Week, 80 TAX NOTES 415, 415-16 (1998). This discusses the passage of the IRS Restructuring and Reform Act of 1998. See David Cay Johnston, *New IRS Law: A Guide to Shifting Burdens*, N.Y. TIMES, July 26, 1998, at 10. This discusses taxpayers' rights provisions in the new tax legislation.

² See Phillip A. Diamond, *Congress Levels the IRS Playing Field with New Reform Act*, ORLANDO BUS. J. (FLA.) Sept. 18, 1998, at 40 (stating act provided valuable new protections to taxpayers); see also Curtiss Olsen, *IRS Restructuring and Reform Act: A Slingshot for David the Taxpayer*, <<http://www.calcpa.org/wire/articles/wire.98.1>> (visited Jan. 9, 1999) (stating act 'waters down' definition of legal requirements for taxpayers to win); *ABA Tax News - IRS Restructuring and Reform Act of 1998* <<http://www.anchin.com>> (visited Jan. 9, 1999) (stating courts must find in taxpayers' favor on factual issues where evidence presented is equally weighted); 98 TAX NOTES TODAY 125-35 (1998) (setting forth full remarks of Senators Roth, Moynihan, Hatch, Enzi, McCain, Kyl, Grassley, Murray and Snowe in debate on Conference Report recommending bill).

³ See Title Clause of P.L. 105-206 (H.R. 2676), July 22, 1998, and § 1(b) (stating that amendment's changes are to be considered repeals or amendments to Internal Revenue Code of 1986); 144 Cong. Rec. S7717 (1998) (considering conference report accompanying H.R. 2676); Donmoyer, *supra*, note 1, at 415-16 (discussing purpose of Act); Amy Hamilton, *Senate Finance Committee Approve Yet-To-Be-Written IRS Reform Bill*, 77 TAX NOTES 7, 7 (1998) (stating House Ways and Means Committee Chair Bill Archer's concerns of protecting taxpayers from IRS).

the taxpayer to the IRS.⁴

Section 7491 of the Internal Revenue Code shifts the burden of proof from taxpayers to the Internal Revenue Service in litigation if certain prerequisites are met.⁵ First, the taxpayer must comply with all substantiation requirements of the Internal Revenue Code.⁶ Second, the taxpayer must maintain records in the same manner as prior to the amendment and cooperate with requests for documentary evidence and witness testimony.⁷ Third, partnerships or corporate taxpayers must not have a net worth exceeding \$7,000,000 in that tax year.⁸ Additionally, all taxpayers must wait until an audit or examination is completed after July 22, 1998.⁹ Any corporate or individual taxpayer meeting these requirements may avail itself of the benefits of the section.

It should be noted the new section also automatically imposes the burden of proof on the Commissioner of Internal Revenue in

⁴ See 26 U.S.C. § 7491 (1998).

⁵ See 26 U.S.C. § 7491 (1998); see also Nathan E. Clukey, *Benefits of Shifting the Burden of Proof to the IRS are Limited*, 82 TAX NOTES 683, 689-95 (1999) (providing in-depth analysis of section 7491 and its statutory conditions); Wm. Brian Henning, *Reforming the IRS: The Effectiveness of the Internal Revenue Service Restructuring and Reform Act of 1998*, 82 MARQ. L. REV. 405, 408-413 (1999) (analyzing shifting burden of proof); Burgess J.W. Raby and William L. Raby, *Tax Practitioners and Burden of Proof*, 80 TAX NOTES 829, 831-33 (1998) (discussing various new strategies available to tax practitioners regarding burden shifting); Sheryl Stratton, *Making Sense of a Political Provision*, 80 TAX NOTES 887, 887-89 (1998) (discussing impact on taxpayer, IRS and courts).

⁶ See 26 U.S.C. § 7491(a)(2)(A) (1998) (stating that statutory provisions applicable only where taxpayer complies with requirements); see also Clukey, *supra* note 5, at 691-92 (discussing condition of substantiation); Stratton, *supra* note 5, at 889 (quoting IRS Assistant Chief Counsel Deborah A. Butler that taxpayers making good faith effort to comply with tax obligations should not fear reasonable requests by IRS). See generally 105 Cong. Rec. S. 4413 (daily ed. May 6, 1998) available in 1998 WL 2260267 (F.D.C.H.) (stating Senator Graham's remarks regarding collection efforts by IRS).

⁷ See 26 U.S.C. § 7491(a)(2)(B) (1998); see also Clukey, *supra* note 5, at 692-93 (discussing statutory conditions of maintaining records and reasonable cooperation).

⁸ See 26 U.S.C. § 7491(2)(C) (1998) (noting that qualification as "partnership, corporation, or trust" requires meeting requirements outlined in § 7430 (4)(A)(ii)); see also 26 U.S.C. § 7430(c)(4)(A)(ii); *Trotz v. Commissioner*, 361 F.2d 927, 930 (10th Cir. 1966) (refusing to infer value test so as to render statutory wording of § 7430(c)(4)(A)(ii) obsolete); H.R. Rep. No. 105-364(I)(1997) (available at <http://thomas.loc.gov/cgi-bin/query/D?c105:1:/temp/~c105VaKGeQ:e65589>) (visited Nov. 23, 1999) (stating committee's concern of disadvantaging individual or small business taxpayers while not harming wealthy taxpayers).

⁹ See 26 U.S.C. § 7491 (1998); see also *Andrews v. C.I.R.*, 17 F.3d 785 (5th Cir. 1997) (noting taxpayer still bears burden of proof until cases arise under new enactment); Internal Revenue Service Restructuring and Reform Act, July 22, 1998, P.L. 105-206, Title III, Subtitle A, § 3001(c), 112 Stat. 727 (stating effective date for amendment is after it is signed into law, July 22, 1998).

two situations:¹⁰ (1) when the IRS includes in income an item "reconstructed" from statistical information of unrelated taxpayers,¹¹ and (2) when the proceeding involves an individual taxpayer's disputed liability for a penalty or an addition to taxes due or owed.¹² However, because these last two provisions are of automatic application, their effect is not discussed herein.

II. HISTORY OF THE BURDEN OF PROOF IN TAX CASES

In our system of taxation, the burden of proof has always rested with the taxpayer.¹³ Placing the burden on the taxpayer was initiated when Congress passed the Revenue Act of 1924,¹⁴

¹⁰ But see *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 592 (1931) (placing burden on IRS to prove transferee liability); 26 C.F.R. § 301.7454-1 (placing burden of proof on Commissioner in fraud with intent to evade tax proceeding); 26 C.F.R. § 301.6902-1 (placing burden of proof on Commissioner to show liability as transferee of property, but not to show that liability for tax); 26 C.F.R. § 1.6694-3 (placing burden of proof on government in § 6694(b) penalty proceeding to prove preparer willfully attempted to understate tax liability, recklessly or intentionally disregarded rule or regulation, and in good faith challenge to regulation's validity); 26 C.F.R. § 301.7454-2 (placing burden of proof on commissioner in self-dealing cases involving foundation managers, trustees of black lung benefit trusts); <<http://www.us.kmpg.com/irs>> (visited Nov. 5, 1998) (noting burden of proof already lies on IRS in fraud, prohibited transactions, illegal bribes and kickback cases).

¹¹ See 26 U.S.C. § 7491(b) (1998) (discussing use of statistical information on unrelated taxpayers); see also Scot P. Gormley & Thomas M. Porcano, *Reconstruction of Income by the Internal Revenue Service*, 77 TAXES 34, 34 (1999) (examining reconstruction methods in IRS).

¹² See 26 U.S.C. § 7491(c) (1998) (setting forth Secretary's burden regarding potential liabilities); see also Steve R. Johnson, *The Dangers of Symbolic Legislation. Perception and Realities of the New Burden-of-Proof Rules* 84 IOWA L. REV. 413, 421 (1999) (arguing propriety of burdening IRS as it can accurately determine if refunds were made).

¹³ See *Dietz 3578 Corporation v. United States*, 939 F.2d 1, 4 (2d Cir. 1991) (noting Congressional grants of discretion to Commissioner entitle determinations to greater degree of deference); *United States v. Rexach*, 482 F.2d 10, 16 (1st Cir. 1973) (allocating burden of proof to taxpayers based on party possessing information necessary to establish income and deductions); *G.U.R. Company v. Commissioner*, 41 B.T.A. 223, 225 (1940), *affd*, 117 F.2d 187 (7th Cir. 1941) (noting Commissioner's determination revised only if arbitrary, capricious or unreasonable); *Asiatic Petroleum v. Commissioner*, 31 B.T.A. 1152, 1158 (1935), *affd*, 79 F.2d 236 (2d Cir. 1935) (noting Congressional grants of discretion to Commissioner entitle determinations to greater degree of deference); *Intercompany Transfer Pricing and Cost Sharing Regulations Under Section 482*, 57 Fed. Reg. 3571, 3577-78 (1992) (to be codified at 26 C.F.R. pt. 1) (stating well-settled principle ordinarily entitling Commissioner's deficiency determination to presumption of correctness results in taxpayers' bearing burden of disproving Commissioner's determination in judicial proceedings) (citing *Welch v. Helvering*, 290 U.S. 111, 115 (1933) (stating Commissioner's ruling is presumptively correct); see also Clukey, *supra* note 5 at 687-88 (discussing burden of proof in tax controversies). See generally Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 256-263 (1988) (setting forth historical development of treatment of burden of proof in tax cases).

¹⁴ See Revenue Act of 1924, ch. 234, § 900, 43 Stat. 253, 336 (1924) (establishing Board of Tax Appeals).

which created the Board of Tax Appeals and granted it rule-making authority.¹⁵ The Board of Tax Appeals created Rule 20, which first placed the burden of proof squarely on the taxpayer's shoulders.¹⁶ When the Board of Tax Appeals was transformed into the Tax Court in 1954,¹⁷ its jurisdiction extended only to deficiency controversies.¹⁸ It also promulgated rules placing the burden of proof on the taxpayer to disprove a deficiency assessment.¹⁹ The Circuit Courts of Appeal, enjoying larger tax

¹⁵ *Id.* at § 900(h) (stating that board proceedings to be conducted "in accordance with such rules of evidence and procedure as the Board may prescribe"); see also 26 U.S.C. § 7453 (1998) (providing that power continues to rest solely in tax court "Except in the case of proceedings conducted under section 7436(c) or 7463" because Tax Court proceedings are to be conducted "in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia"); Deborah A. Geier, *The Tax Court, Article III and the Proposal Advances by the Federal Courts*, 76 CORNELL L. REV. 985, 990-91 (1991) (providing brief history of Tax Court and its predecessor); Camilla E. Watson, *Equitable Recoupment: Revisiting an Old and Inconsistent Remedy*, 65 FORDHAM L. REV. 691, 775 (1996) (citing Harold Dubroff, UNITED STATES TAX COURT: A HISTORICAL ANALYSIS, 1-107 (1979) (describing Board as independent agency of executive Branch)).

¹⁶ See B.T.A. Rule 20 (1924) reprinted in George M. Morris et al., *Procedure and Practice Before the United States Board of Tax Appeals* 138 (1925) (stating "[u]pon hearing of appeals the taxpayer shall open and close and the burden of proof shall be upon him"); see also Steve R. Johnson, *The Dangers of Symbolic Legislation. Perception and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 416 (1999) (stating settled law: burden of proof on taxpayer); Martinez, *supra* note 13, at 259 (discussing Board promulgated rule placing burden of proof on taxpayer). See generally *United States v. Tanis*, 428 U. S. 433, 440 (1976) (stating burden on taxpayer).

¹⁷ See 26 U.S.C.A. § 7441 (establishing United States Tax Court under Article I of United States Constitution).

¹⁸ See 26 U.S.C.A. § 7442 (establishing Tax Court jurisdiction as conferred by Title 26 and prior versions of Code); see also 26 U.S.C.A. § 7453 (1998), Tax Court Rule 20(a) (providing taxpayer's filing petition commences deficiency redetermination, liability of transferee or fiduciary, declaratory judgment, to obtain or restrain disclosure, to adjust or readjust partnership items, or to obtain award for reasonable administrative costs); M. L. Barton, *Portillo v. Commissioner: A Question of Accountability—Fifth Circuit Requires Both I.R.S. and Taxpayers to Substantiate Tax Court Claims*, 66 TUL. L. REV. 1548, 1551 (1992) (providing brief history of development of Board of Tax Appeals to Tax Court); Daniel J. Gifford, *Adjudication in Independent Tribunals, The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 983 (1991) (stating that Tax Court was established as Article I court by Tax Reform Act of 1969, Pub. L. No. 91-172, § 951-62, 83 Stat. 730-36); Judith Resnick, *Rereading "the Federal Court": Revising the Domain of the Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1030 (1994) (citing Harold DuBroff, THE UNTIED STATES TAX COURT: AN HISTORICAL ANALYSIS 165 (1979) (pointing out members of Board became judges of Tax Court)).

¹⁹ See Tax Court Rule 142, 26 U.S.C.A. § 7453 (1998):

Rule 142. Burden of proof

(a) General. The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon the respondent. As to affirmative defenses, see Rule 39.

(b) Fraud. In any case involving the issue of fraud with intent to evade tax, the

controversy jurisdiction, have also placed the burden of proof on the taxpayer. Those courts continue that practice both in the context of a refund proceeding, wherein the taxpayer had paid the tax and thereafter sought a determination of overpayment,²⁰ and within deficiency proceedings.²¹ This state of affairs was denounced by many, and so legislative reform efforts began.

A. Legislative History

Section 7491 of the Internal Revenue Restructuring and Reform Act of 1998 emerged after years of Congressional initiatives and debates.²² Almost immediately upon passage of the 1986 Reform Act, recommendations for an IRS overhaul began.²³ Despite what seemed to be a great Congressional accomplishment, popular and legislative dissatisfaction arose once again, and proposals for another wholesale restructuring of

burden of proof in respect of that issue is on the respondent, and that burden of proof is to be carried by clear and convincing evidence. Code Section 7454(a).

Id. See, e.g., *R.L. Goodman v. Commissioner*, 761 F. 2d 1522, 1524 (11th 1985) (articulating this burden); *Roy G. Edwards v. Commissioner*, 906 F.2d 114, 115 (4th 1990) (articulating time when burden shifts); see also 26 U.S.C. 6406 (1998) (entitled "Prohibition of Administrative Review of Decisions" and providing no other mechanism for review other than that provided in Tax Court absent mathematical error or fraud); *Crocker v. United States*, 323 F. Supp 718, 724-5 (N.D. Miss. 1971) (holding that section 6406 does not prevent commissioner's review of own decision); *Hacker v. United States*, 65 T.C.M. (CCH) 3041 (1993) (reviewing 6406 and its legislative history).

²⁰ See, e.g., *Helvering v. Taylor*, 293 U.S. 507, 515 (1935) (holding burden on taxpayer to establish amount of deduction claimed); *Compton v. United States*, 334 F.2d 212, 216 (4th Cir. 1964) (holding taxpayer must sustain burden of proof to establish entitlement to refund); see also *Higginbotham v. United States*, 556 F.2d. 1173, 1175 (4th Cir. 1977) (explaining difference between refund application and assessment challenge without payment of tax). See generally Tax Ct. R. 260 (describing proceedings to force IRS to make refunds of determined overpayments).

²¹ See Michael I. Saltzman, IRS PRACTICE AND PROCEDURE, ch.14 (1991) (describing tax collection process); James K. Wilkens & Thomas A. Matthews, *A Survey of Federal Tax Collection Procedure: Rights and Remedies of Taxpayers and the Internal Revenue Service*, 3 ALASKA L. REV. 269, 270-286 (1986) (discussing background and procedure of taxpayers fights in deficiency proceedings).

²² See H.R. 2389, 97th Cong. (1981) (discussing proposals to shift all burdens to IRS); see also *Hearing on Revenue Revision, 1925, Before the House Comm. On Ways & Means*, 69th Cong. 877 (1925) (discussing early attempts to shift burden); Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 243 n. 13 (1988) (noting that proposals to shift burden of proof surfaced as early as 1935).

²³ See 100 Stat. 2085 (P.L. 99-514) (1986) (affecting massive changes to Internal Revenue Code, but not to burden of proof specifically); see also Bernard J. Long, Jr., *Burden of Proof Shift: Tom Jefferson Would Be Proud*, 77 TAX NOTES 625, 625 (1997) (advocating burden shift). But see Steve R. Johnson, *The Dangers of Symbolic Legislation. Perception and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 421 (March 1999) (stating IRS Commissions' opposition to general burden shift).

the IRS were brought to the floor.²⁴ This time, the initial call to action was led by Congressman James A. Traficant (D-OH),²⁵ who presented the first "Taxpayer's Bill of Rights", or "TBOR" as it came to be known.²⁶ Congressman Traficant's efforts were subsequently succeeded by Senator Bob Kerrey's (D-NE) reformation proposals in 1995.

The first step in attaining these reformatory goals was the creation of the National Commission on Restructuring the IRS, behind which Senator Robert Kerrey was a major motivating force.²⁷ That Commission launched a massive effort to determine what caused the ills complained of both within and without the IRS.²⁸ The Commission issued a report which primarily

²⁴ See S. Rep. No. 174, 105th Cong., 2d Session, 1998 (setting forth legislative history of Internal Revenue Service Restructuring and Reform Act of 1998); *Feature of the Week*, <<http://www.tax.org/fotw/fl11197-t.html>> (visited Nov. 5, 1998) (reciting portions of legislative history); Sheryl Stratton, *Joint Committee on Taxation May Recommend New IRS Burden of Proof in Tax Litigation*, 1/1/98 NAT'L PUB. ACCT. 34, 34 (noting Senate proposal overhauls Representative Traficant's original proposal in H.R. 367); see also *Former IRS Chiefs Say IRS Should Not Bear Burden of Proof in Court*, 95 TAX NOTES TODAY 75-20 (1995) (reproducing letter from Shirley D. Petersen, Randolph W. Thrower, Donald C. Alexander, Mortimer M. Caplin, Sheldon S. Cohen, Roscoe L. Egger Jr., Fred T. Goldberg Jr., Lawrence B. Gibbs, Jerome Kurtz and Johnnie M. Walters).

²⁵ See H.R. 367 105th Cong., at 2 (1997) (proposed Jan. 7, 1997 and entitled "A bill to amend the Internal Revenue Code of 1986 to place the burden of proof on the Secretary of the Treasury in civil cases", Sec. 7524 did not contain four requirements); see also Representative Traficant's Extended Remarks, January 9, 1997, <<http://www.house.gov/traficant/hr367.htm>> (noting H.R. 367 provision provided burden of proof would have remained on taxpayer in all administrative proceedings, but shift to IRS in civil cases would restore faith in IRS); Stratton, *supra* note 24, at 34 (noting that Traficant campaigned for shift and for providing within reasonable period of time access to and inspection of all witnesses, information, and documents within taxpayer control as reasonably requested by Secretary in H. Rept. 104-506 for H.R. 2337); <<http://scratch.abanet.org/tax/irs926.html>> (visited Jan. 25, 1999) (containing Sept. 26, 1997 comments of Pamela F. Olson, Vice-Chair of ABA Section of Taxation, on H.R. 367 and opposing shifting burden of proof).

²⁶ See H.R.J.Res. 447, 102nd Cong. (1991) (introducing Representative Allen's joint resolution on March 19, 1992 to amend United States Constitution with "Taxpayer's Bill of Rights" requiring deficit reduction, balanced budget and revenue limitation); H.R. 2337, 104th Cong., at 20 (1996) (enacting second TBOR in section 1204(a) originating in prior session as H.R. 661, 104th Congress, 1st Session (1995)). See generally Susan Stratton, *Shifting the Burden of Proof to the IRS: Considering the Possibilities*, 72 TAX NOTES 1328, 1329 (1996) (discussing Congressman Traficant's background and personal interests in tax reform).

²⁷ See *Feature of the Week*, <<http://www.tax.org/fotw/fl11197-t.html>> (visited Nov. 5, 1998) (reciting portions of legislative history); *Treasury, Postal Service, and General Government Appropriations Act*, Pub. L. No. 104-52, 109 Stat. 468 (1996) (appropriating funds to create National Commission formed in 1995); see also Michael J. Hirsch, *Trumping the President*, NEWSWEEK, Nov. 3, 1997 (setting forth full remarks of Senator Daschle, who stated, "We would not be here today, poised to enact the most sweeping restructuring of the Internal Revenue Service in living memory if it were not for the vision, diligence, and persistence of the senior Senator from Nebraska, Bob Kerrey").

²⁸ See National Commission on Restructuring the IRS Report, Introductory Note at

suggested massive changes in the culture of the IRS – from pro-government to pro-taxpayer. On June 25, 1997, that report was referred to the House.²⁹ Its suggestions served as the basis for the House's efforts to reform the Internal Revenue Service.³⁰

In its report, the House Ways and Means Committee noted the existence of a judicially created rebuttable presumption of correctness favoring the Commissioner's determination of tax liability, which requires taxpayers to present *prima facie* proof sufficient to support a contrary finding. The report noted that even if a *prima facie* finding is made, the "ultimate burden of proof or persuasion on the merits remains with the taxpayer."³¹

The theme of the report and subsequent reform was not only to revise the Code, but also to institute fundamental changes in the attitude of the IRS.³² In furtherance of this goal, Congressman Bill Archer (R-TX), Chairman of the House Ways and Means

vii (June 25, 1997) (hereinafter "Commission Report") (noting report based on year of intensive work by Commission members which included: receipt of "extensive input from American taxpayers and experts on the IRS and tax system" in 12 days of public hearings, "hundreds of hours in private sessions with public and private sector experts, academics, and citizen's groups to review IRS operations and services", three field hearings in Cincinnati, Omaha, and Des Moines, and private meetings with "over 500 individuals, including senior level and front-line IRS employees across the country", and thousands of reports and documents on IRS operations, management, governance, and oversight); see also *Burden-of-Proof Provision Could Spur Disputes, Tax Court Chief Judge Says*, 98 TAX NOTES TODAY 12-58 (1998) (setting forth Chief Judge Mary Ann Cohen's recommendations to Senate Finance Committee). See generally H.R. 105-364(I), 105th Cong., at 1 (1997) (recommending passage and new strategies)

²⁹ See Commission Report, *supra* note 28; see also Steve R. Johnson, *The Dangers of Symbolic Legislation. Perception and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 421 (1999) (describing timing of report's presentation to Congress and noting 402 to 8 House vote and 96 to 2 in Senate); *Internal Revenue Restructuring and Reform Act of 1997: Hearings before the Subcommittee of Oversight House Ways and Means Committee*, 105th Cong., at 60 (1997) (noting passage votes); <http://www.senate.gov/activities/105-2/vote_00189.html> (setting forth Senate passage votes); *Final Vote Results For Roll Call 274*, <<http://143.231.123.93/cgi-bin/vote.exe?year=1998&rollnumber=274>> (setting forth June 25th 1998 House vote at 402 to 8).

³⁰ See H.R. Rep. No. 105-832 at 1 (1998) (setting forth legislative history of Section 7491's passage).

³¹ See H. R. Conf. Rep. 105-599, at 1 (1998) (noting provision's effect was that "plaintiff not only has the burden of proof of establishing that the Commissioner's determination was incorrect, but also of establishing the merit of its claims by a preponderance of the evidence") (quoting *Danville Plywood Corp. v. U.S.*, 16 Cl. Ct. 584 (1989)); H.R. 105-26, at 18 (1997) (describes legislative history from proposals of national commission on Restructuring Internal Revenue Service through passage).

³² See H. R. Conf. Rep. 105-599, at 1 (1998) (noting intent to alleviate taxpayer burden in IRS litigation); House Ways and Means Report, *supra* note 31; *Tax Regs in Plain English*, <http://www.ire.ustras.gov/plain/tax_regs/rra-3001.html> (visited Nov. 23, 1999) (noting Congressional intent to alleviate disadvantage of taxpayer in litigation against IRS).

Committee, introduced House Bill, H.R. 2767.³³ Relying on a perceived taxpayer disadvantage in dealing with the IRS, H.R. 2767 provided a two-tiered approach to shifting the burden of proof from the taxpayer to the IRS.³⁴

First, the taxpayer had to fully cooperate with all "reasonable requests" of the IRS.³⁵ This "cooperation" included exhausting all administrative remedies and providing the IRS with access to all documents, witnesses and information both within and, curiously, without the taxpayer's control, even if such information or witnesses were in a foreign jurisdiction. Second, certain net worth levels could not be exceeded for purposes of the recovery of attorney's fees. This section was later translated into the net worth requirements in the final law. Notably, the taxpayer was not relieved of any of the already existing substantiation requirements, both within the Code explicitly or within the regulations promulgated by the Secretary.³⁶ Public hearings were held which included testimony from tax practitioners, accounting experts and taxpayer rights advocacy groups, some arguing for, but the majority arguing against the

³³ See House Report No. 105-364(I), at 10 (1997) (setting forth pertinent legislative history of Third Taxpayer Bill of Rights ("TBOR") in section C; noting Committee recognized presumption and its concern that individual and small business of disadvantaged taxpayers by burden of proof rules when forced to litigate with IRS; and stating "facts asserted by individual and small business taxpayers who fully cooperate with the IRS and satisfy all relevant substantiation requirements should be accepted [via a shift in] the burden of proof to the Secretary [which] will create a better balance between the IRS and such taxpayers, without encouraging tax avoidance").

³⁴ See H. R. Conf. Rep. 105-599, at 1 (noting two tiered approach).

³⁵ See H. R. Conf. Rep. 105-599, at 1. The report noted that such cooperation, according to this House Bill, included:

providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer, as reasonably requested by the Secretary. Full cooperation also includes providing reasonable assistance to the Secretary in obtaining access to and inspection of witnesses, information, or documents not within the control of the taxpayer (including any witnesses, information, or documents located in foreign countries). A necessary element of fully cooperating with the Secretary is that the taxpayer must exhaust his or her administrative remedies (including any appeal rights provided by the IRS).

³⁶ See H. R. Conf. Rep. 105-599, at 1. The report noted that the new provision:

explicitly states that nothing in the provision shall be construed to override any requirement under the Code or regulations to substantiate any item. [. . .] Taxpayers who fail to substantiate any item in accordance with the legal requirement of substantiation will not have satisfied all of the legal conditions that are prerequisite to claiming the item on the taxpayer's tax return and will accordingly be unable to avail themselves of this provision regarding the burden of proof. Thus, if a taxpayer required to substantiate an item fails to do so in the manner required (or destroys the substantiation), this burden of proof provision is inapplicable. *Id.*

measure.³⁷

President Clinton offered another approach to the reform effort which focused on creating citizen advocacy panels to protect taxpayers' rights.³⁸ Clinton disagreed with substantial portions of the House proposals, and his Secretary of the Treasury, Robert Rubin, staunchly opposed the section 7491 shifting of the burden of proof.³⁹ President Clinton did, however, support changing the IRS culture and environment. This support manifested itself in the appointment of the new IRS Commissioner, Charles Rossotti,⁴⁰ who promptly began evaluating the need for customer – friendly changes within the IRS.⁴¹

³⁷ See H. R. Conf. Rep. 105-599, at 1; see also *Senate Debate Begins on Conference Report to IRS Reform Bill*, 98 TAX NOTES TODAY 135-25 (1998) (summarizing debates and testimony).

³⁸ See 10/26/97 FACE THE NATION TRANSCRIPT, 1997 WL 7753795 (stating President Clinton had "been resisting the Republican plan"); *Get on with it Republicans! Criticism of Clinton's IRS Reform Plan is Counterproductive Lawmakers Will Have Plenty of Opportunities to Discuss Clinton's Efforts*, ORLANDO SENTINEL, Oct. 17, 1997, at A18 (arguing Republicans delay reform attempts); Carl Rowan, *Clinton IRS 'Reform' Doesn't Gauge American Mood*, CHICAGO SUN TIMES, Oct. 12, 1997, at 45 (arguing Clinton proposal for Civilian Advocacy Panels to which taxpayers could appeal deficiencies was insufficient to protect against IRS).

³⁹ See John F. Harris, *Clinton's IRS Reforms Fall Short, Critics Say*, CHICAGO SUN TIMES, Oct. 12, 1997 at 37 (describing Clinton administration plan); Michael Hirsh, *Trumping the President*, NEWSWEEK, Nov. 3, 1997, at 49 (noting Treasury considered provision "dangerous overreaction" and "invitation to widespread tax cheating"); Editorial, *Clinton Feels Pressure on IRS, Lands on Right Side of Issue*, OMAHA WORLD-HERALD, Oct. 25, 1997, at 66 (noting Secretary Rubin's opposition to burden of proof provision and his statement that it would make agency "much more intrusive" because tax "auditors would have to demand even more information from taxpayers than they now do [. . .] in order to build the strongest possible case").

⁴⁰ See 1998 WL 412485, July 23, 1998 *Fact Sheet on the IRS Reform Bill of July 22, 1998* (noting President Clinton had "directed" Vice-President Al Gore and Secretary Rubin to conduct "top to bottom review of the customer service at the IRS"); see also <ne-nj@irs-smail.fedworld.gov> (visited 11/30/98) (noting cultural changes at IRS include national call center implementation to distribute inquiries nationwide instead of localizing them; Hirsch, *supra* note 40, at 49 (noting such changes)).

⁴¹ See Charles Rossotti, *Fairness Comes First*, USA TODAY, Jan. 15, 1998, at 12A (pointing out newly appointed Commissioner of Internal Revenue Service was 'disturbed' by internal audit report showing "the IRS has put too much emphasis on revenue and other statistical goals and not enough emphasis on quality customer service and respect for taxpayer rights"); see also *Regulations And More-IRS Has Been Busy On Many Fronts*, 89 JOURNAL OF TAXATION 131,131 (1998) (noting changes to top IRS management structure included creating two new positions—Deputy Commissioners for Operations and for Modernization, and other appointments included new Chief Information Officer and new National Taxpayer Advocate). See e.g., Dec. 21, 1998, White House Press Release, *President Clinton Names Lawrence Rogers As Acting Inspector General For Tax Administration*, (available at <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pd:/oma.eop.gov.us/1998/12/22/8.text.1>> (visited Mar. 18, 1998) (noting new appointment to create new managerial strategies); July 22, 1998 White House Press Release, *President Clinton and Vice President Gore: Delivering an IRS for the 21st Century*, available at <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pd:/oma.eop.gov.us/1998/7/23/9.text.1>> (visited Mar. 18, 1999) (noting changes in IRS, such Presidential direction to Gore and

Meanwhile, Congressional efforts continued. After House passage⁴² and issuance of the Conference Report,⁴³ H.R.2767 was referred to the Senate. In an effort to overcome Presidential opposition to the measure, the Senate Finance Committee, led by Chairman William V. Roth, Jr. (R-DEL), also held hearings in January and February of 1998.⁴⁴ These Senate hearings yielded widely publicized, embarrassing and even horrific stories of IRS abuses of power, ranging from unbridled raids of homes to predetermined outcomes before the taxpayer had a chance to rebut any allegations.⁴⁵ This publicity increased attention on IRS reform.⁴⁶ Even the Service itself began looking into its workings

Rubin to conduct top-to-bottom review of customer service, resulting in revamping of customer service at IRS under new IRS Commissioner, Charles Rossotti; other changes included: putting taxpayer first; expanded and improved phone service—24 hours-a-day/seven days-a-week; Problem Solving and Problem Prevention days; Citizen Advocacy Panel; development of user-friendly Web site; and expanded electronic filing programs).

⁴² See Editorial, *1040Alert! IRS is About to Change*, 76 CHI. TRIB. 10 (noting passage of bill was by vote of 402-8). But see, <<http://www.hus.gov/doolittle/pr11057.html>> (Nov. 5, 1997) (visited January 25, 1999) (noting passage was 426 to 4).

⁴³ See H.Rep.No.105-599, at 1 (1998); H. Rep.No. 105-364(I) at 1 (noting House Ways and Means favorable passage); see also Jacob Mertens, *LAW OF FED. INCOME TAX'N*, Conf. Report (1998).

⁴⁴ See, e.g., Martha A. Sabol, *Taxpayers Benefit from Bipartisan Focus on Taxpayers Rights: The IRS Restructuring and Reform Act*, 10 LOY. CONSUMER L. REV. 262, 263 (1998) (stating Senate Finance Committee heard first hand taxpayer testimony of IRS abuses).

⁴⁵ See Hearings Before the Senate Small Business Committee, available at 1998 WL 8992062 (setting forth Testimony of C. Virginia Kirkpatrick, testifying as sole proprietor to IRS' inability to determine whether overpayment or deficiency existed on Company's FICA and withholding accounts); Hearings Before the Senate Small Business Committee, Testimony of Todd McCracken, 1997 WL 14152299 (President of National Small Business United recounting farmer's story of imposition of \$75,000 penalty assessed nine months after clerical error resulted in checking off wrong waiver for filing on paper instead of magnetic tape); see also *Tax Tales*, NEW REPUBLIC, May 18, 1998, at 7 (noting IRS horror stories included "IRS manager who stole 20 automobiles from the service (later found to be [only?] two), an IRS agent who egregiously abused travel-expense privileges, and a Texas oilman who was the subject of a highly publicized raid by 64 armed and - judging by their hostile dispositions - very dangerous agents" many of which allegations were later proved false); Robert J. Friedman & Holland & Knight, *IRS Reform: Is It Possible?* THE METROPOLITAN CORPORATE COUNSEL INC. (MID-ATLANTIC EDITION), Feb. 1998, at 14 (calling Senate hearings "sideshow" in which "three days of high profile hearings on alleged IRS abuses of taxpayers "painted a picture of an out-of-control tax administration agency").

⁴⁶ See, e.g., NEW REPUBLIC May 18, 1998, at 7; see also Rebecca Leung, *Focusing on Taxpayers' Rights*, <<http://www.ABCNews.com>> (May 7, 1998) (reporting Treasury Department appointment of William Webster, former director of CIA and FBI, to review practices of agency's criminal branch); Linda Douglas, *A Parade of Tax Horror Tales*, <<http://www.ABCNews.com>> (Apr. 29, 1998) (announcing IRS head launched independent investigation of agency); Press Release #105-376, available at <<http://www.senate.gov/finance/105-376.html>> (visited Nov. 5, 1998) (quoting Senate Finance Committee Chairman William V. Roth (R-DE) as characterizing internal IRS reports as "stunning confession[s] of the sins of the IRS" and praising concerned IRS employees contributions to discussion of irregularities); Press Release #105-377 (July 10, 1998), available at

and evaluating its performance in light of the allegations of abuse.⁴⁷

These politically damaging revelations, commentators said, prevented President Clinton from withstanding the steamrolling reform movement.⁴⁸ Secretary of the Treasury Robert Rubin succumbed as well.⁴⁹ President Clinton found himself suddenly supporting the measure he had initially opposed.⁵⁰ In a short time, the remaining provisions were hastily passed in the

<<http://www.senate.gov/finance/105-377.html>> (visited Nov. 5, 1998).

⁴⁷ See generally Editorial, *supra* note 43.

⁴⁸ See *IRS Should Bear Burden of Proof*, <<http://www.athensnewspapers.com/1997/110197/1101.o2edit3.html>> (visited Nov. 24, 1998) (noting President's position reversal due to popular support of provision); Editorial, *Clinton Feels Pressure on IRS, Lands on Right Side of Issue*, OMAHA WORLD-HERALD, Oct. 25, 1997, at 66 (noting President Clinton's support came shortly before measure advanced in House Ways and Means Committee 33-4 and administration's change in position was 'awkward'); Editorial, *Reforming the IRS Gains Broad Support*, BALTIMORE SUN, May 11, 1998, at 8A (stating "President Clinton is joining, not opposing, this juggernaut, lest it flatten him"); Editorial, *A Solid Plan Neither the Republicans nor the Democrats Got exactly What they Wanted, But it Appears Americans Will End Up Winners with the Internal Revenue Service Plan*, ORLANDO SENTINEL, Nov. 8, 1997, at A20 (noting "Mr. Clinton had little choice but to join the bandwagon after key Democrats signed onto the plan"); see also <<http://hillsouth.house.gov/IssueFocus/Achieve/ac>> (visited Nov. 5, 1998) (quoting J.C. Watts, Republican Conference Chairman, as taking crediting Republicans for measure as follows: "A Republican Congress is improving the quality of life for all Americans [. . .] Our recent legislative victories build on this success" and listing P.L. 105-206 as achievement of 105th Congress as part of "a fair and honest tax code that leaves more money in the pockets of working Americans").

⁴⁹ See Editorial, *Clinton Feels Pressure on IRS, Lands on Right Side of Issue*, OMAHA WORLD-HERALD, Oct. 25, 1997, at 66 (quoting Secretary Rubin that burden of proof provision was still 'concern' but not sufficient to oppose passage of measure); see also *News Conference with Representative Benjamin L. Cardin (D-MD) and Representative Rob Portman (R-OH): IRS Reform*, FEDERAL NEWS SERVICE, Apr. 15, 1998 (indicating Secretary Rubin's support of legislation); Senate Governmental Affairs, IRS Management Oversight Testimony March 12, 1998, Charles O. Rossotti Commissioner Internal Revenue Service, *Federal Document Clearing House Congressional Testimony* (mentioning Secretary Rubin's statement in support of Internal Revenue Service Restructuring and Reform Act of 1997 as passed by House). See generally *The White House: Remarks by President in Signing Internal Revenue Service Restructuring and Reform Act*, M2 Presswire, July 27, 1998 (indicating support for Act and appreciation for those who made it possible, including Secretary Rubin).

⁵⁰ See Editorial, *Clinton Feels Pressure on IRS, Lands on Right Side of Issue*, OMAHA WORLD-HERALD, Oct. 25, 1997, at 66 (quoting Secretary Rubin that burden of proof provision was still 'concern' but not sufficient to oppose passage of measure). See generally *The White House: Remarks by President in Signing Internal Revenue Service Restructuring and Reform Act*, M2 Presswire, July 27, 1998 (indicating support for Act and appreciation for those who made it possible, including Secretary Rubin); *Clinton Signs Law for IRS Overhaul*, AUSTIN AMERICAN-STATESMAN, July 23, 1998, at A4 (reporting President's signing of IRS Restructuring and Reform Act); Sidney Kess, *The Promise and Practice of New Law*, N.Y.L.J., July 20, 1998, at 3 (stating Act expected to be signed into law by President Clinton).

⁵⁰ See generally Editorial, *Clinton Feels Pressure on IRS, Lands on Right Side of Issue*, OMAHA WORLD-HERALD, Oct. 25, 1997, at 66 (noting Clinton's eventual position change).

Senate,⁵¹ though not without revision, and were referred to the President on July 21, 1998.⁵²

The Senate clarified the requirements by specifying that substantiation and record maintenance would continue as under prior law and further clarified the net worth limits.⁵³ It also shortened the amendment's applicability by making it apply only to cases arising six months after the enactment and through June 1, 2001.⁵⁴ The Senate's version also required that taxpayers first present "credible evidence" on a factual issue of a tax liability.⁵⁵ The quantum of proof necessary to support this "credible evidence" standard was defined as "the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted (without regard to the judicial presumption of IRS correctness)."⁵⁶ The Senate then made the

⁵¹ See H.R. 2676, Engrossed Amendment Senate May 7, 1998, CR S7700 (showing unanimous consent to consider conference report); see also Senate Press Release #105-373 (July 9, 1998) (noting Conference Report passed in House on June 25, 1998 and in Senate July 9, 1998 by 96-2); David Hess, *IRS Revamp Could Cost \$46 billion; House Backs Bill: Senate Passage of the IRS Restructuring and Reform Act of 1998 was expected after the July 4th Recess*, THE POST AND COURIER (Charleston, SC), June 26, 1998, at A1 ("Bill . . . is expected to sail through the Senate").

⁵² See 26 U.S.C. § 7491; see also Internal Revenue Service Restructuring and Reform Act of 1998, S. Rep. No. 105-174 at 7. See generally *Fact Sheet on the IRS Reform Bill 7/2/98*, 1998 WL 412485 (White House) (noting Presidential signing); White House Press Release, July 22, 1998, *Presidential Remarks upon Bill signing*, (visited Mar. 18, 1999) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1998/7/24/10.Text.1>> (quoting President Clinton's remarks regarding upgraded customer service at IRS, and bill's attempt to "help the IRS to serve taxpayers as well as the best private companies serve their customers, building on efforts to offer simple high-tech options for filing taxes and making tax forms more easily available over the Internet"); White House Press Release July 22, 1998, *Statement By Vice President Gore On The President's Signing Of The IRS Restructuring And Reform Act*, (visited Mar. 18, 1999) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1998/7/24/4.text.1>> (noting changes in IRS bill ensure 1997 reforms "which began as a joint effort of the National Partnership for Reinventing Government and the Treasury Department, will not only continue but thrive").

⁵³ See H.R. Rep. No. 105-832, at 5 (1998) (setting forth legislative history).

⁵⁴ See H.R. Rep. No. 105-832, at 5 (1998) (reciting portions of legislative history).

⁵⁵ See H.R. Rep. No. 105-832, at 5 (1998) (setting forth legislative history).

⁵⁶ See H.R. Rep. No. 105-832, at 5 (1998). That report further explained the standard of credible evidence as follows: "A taxpayer has not produced credible evidence for these purposes if the taxpayer merely makes implausible factual assertions, frivolous claims, or tax protester-type arguments." Leaving the discretionary decision to the courts, the Senate further stated that the "introduction of evidence will not meet this standard if the court is not convinced that it is worthy of belief." The pro-taxpayer change in attitude, however, is seen in the following conclusion: "If after evidence from both sides, the court believes that the evidence is equally balanced, the court shall find that the Secretary has not sustained his burden of proof." The approach is also seen in requiring that "the Secretary must initially come forward with evidence that it is appropriate to apply a

provisions immediately applicable upon enactment.⁵⁷ The possible conflict as to applicability, referred to above, was clarified in the conference agreement, in which it stated that in any case where there is no examination, the Conference Report makes the amendment applicable to tax periods beginning after the enactment.⁵⁸

Despite the years it took to pass the ideals of taxpayer protection embodied in this bill, the final push though Congress may have damaged a very popular theoretical idea by engrafting requirements eviscerating the effectiveness of the rights granted. The requirements of section 7491 were to have provided an alternative relief route to the aggrieved taxpayers whose experiences dominated the Senate hearings.⁵⁹ This effort seems to have failed entirely.

III. THE IMPLICATIONS OF THE REQUIREMENTS

A preliminary glance at the requirements of the legislation may lead one to assume they are easily satisfied and that the provision's benefits to the taxpayer easily gained. The first requirement, mandating cooperation with all IRS requests,⁶⁰ codified the desired collaboration aspired to in the restructuring amendments.⁶¹ The second requirement of substantiation seems

particular penalty to the taxpayer before the court can impose the penalty." However, even these slight pro-taxpayer stances were tempered by the Senate, requiring that the "Secretary must come forward initially with evidence regarding the appropriateness of applying a particular penalty to the taxpayer; if the taxpayer believes that, because of reasonable cause, substantial authority, or a similar provision, it is inappropriate to impose the penalty, it is the taxpayer's responsibility (*and not the Secretary's obligation*) to raise those issues." *Id.* (emphasis added). In other words, the final burden has been foisted on the taxpayer.

⁵⁷ See H.R. Rep. No. 105-832, *supra* note 54.

⁵⁸ See H.R. Rep. No. 105-832, *supra* note 54; see also *US Senate Passes IRS Reform Bill Conference Report*, 98 TAX NOTES TODAY 1, 136-22 (1998) (quoting proceedings thereof in Senate). See generally, Rowan, *supra* note 39.

⁵⁹ See National Commission, "A Vision of a New IRS", (CITE) (alleging IRS' inefficiencies and abuses of power result largely from agency's organizational structure, its lack of adequate resources and workforce training); see also Michael Hirsch & Fred Goldberg, *Infernal Revenue Disservice*, NEWSWEEK, Oct. 13, 1997, at 32 (recounting stories of abuses heard in Senate hearings); Press Release #105-37, William V. Roth, Jr., (Senate Finance Committee Chairman Roth (R-DE) characterizing internal IRS reports as "stunning confessions of the sins of the IRS"); John Tighe, Jr., "Congressional Reform of the IRS", NEW YORK LAW JOURNAL, Sept. 17, 1998, at 3 (stating "Congress has failed to deliver on its promises of sweeping reform").

⁶⁰ See generally Leung, *supra* note 47.

⁶¹ See 26 U.S.C. § 7491 (1998).

⁶² See 26 U.S.C. § 7491 (2)(B) (1998) (limiting general rule to situations in which

to do nothing to alleviate the burden on the taxpayer, who must provide and maintain records in just the same manner as before the enactment.⁶² This requirement, however, is reasonable as a function of necessity and was recognized as such during the hearings.⁶³ The third requirement, which ensures that the worth of the taxpayer does not exceed certain limits, seems to provide favored status to the small business or the average individual taxpayer by excluding from section 7491's benefits corporate and partnership taxpayers whose net worth exceeds \$7 million. The last requirement, waiting until enactment, ensures that the provision applies prospectively and not retroactively.⁶⁴

Perhaps one way to justify the provision is to view it from an evidentiary perspective. Prior to this enactment, the taxpayer assumed a position akin to a civil defendant—rebutting or overcoming a presumption of correctness in favor of the Commissioner's assessment of deficiency.⁶⁵ Now, apparently, the taxpayer no longer defends by rebutting the pro-IRS presumption, no longer having to prove himself innocent. Instead, section 7491's requirements permit the taxpayer to enjoy remaining innocent until proven guilty, a rhetoric seemingly underlying our system of law. This was intended to put the taxpayer into a defensive posture.

Moreover, requiring proactive compliance with the IRS prior to the institution of litigation has pushed the taxpayer into a role akin to a civil plaintiff,⁶⁶ because of the substantiation and

taxpayer provided all records and fully cooperated with IRS).

⁶² See Tom Herman, *A Closer Look Some Myths, And Realities, When It Comes to Your Taxes*, CHI. TRIB., Mar. 30, 1999, at 1 (noting burden doesn't shift if taxpayer fails to keep records, destroys records or refuses to cooperate with IRS); Ray A. Knight and Lee G. Knight, *Shifting the burden of proof*, 188 J. ACCT. 89, 89 (1999) (setting forth methods so as to comply with various substantiation requirements); Mark Schwanhausser, *Cut To The Chase Here's A Detailed Look At Some Deductions That Are Commonly Overlooked By Taxpayers*, CHI. TRIB., Mar. 11, 1999, at 1 (warning not to "get sloppy" with record-keeping or "thumb your nose at the auditor just because Congress shifted the burden of proof from taxpayers to the IRS" because of its exaggerated impact).

⁶³ See Editorial, *supra* note 51, at 66.

⁶⁴ See 26 U.S.C. § 7491 (1998).

⁶⁵ See Christina Potter Moraski, *Proving a Negative - When the Taxpayer Denies Receipt*, 70 CORNELL L. REV. 141, 142-43 (1984) (noting both burdens rest on taxpayer).

⁶⁶ See Phillip A. Diamond, *Congress Levels the IRS Playing Field with New Reform Act*, ORLANDO BUS. J. (FLA.) Sept. 18, 1998, at 40 (stating act provided valuable new protections to taxpayers); see also Curtiss Olsen, *IRS Restructuring and Reform Act: A Slingshot for David the Taxpayer*, (visited Jan. 9, 1999) <<http://www.calcpa.org/wire/articles/wire.98.1>> (stating act 'waters down' definition of legal requirements for taxpayers to win); ABA Tax News - IRS Restructuring and Reform Act of 1998

cooperation requirements.⁶⁷ Prior to the amendment, as well as today, the only party actually able to prove any factual allegation is, was and will always be the taxpayer.⁶⁸ This is true due to the simple reality that the taxpayer has the sole access to whatever records may substantiate a deduction or claimed expense. The tax courts have consistently used this logic to support the IRS's presumption of correctness against the taxpayer.⁶⁹ Section 7491 really applies the same logic, but is veiled in political posturing. Taxpayers must still cooperate with the IRS because only they have evidence to support any factual assertion.⁷⁰ In cooperating and substantiating under the new provision, the taxpayer provides the same pieces of evidence as those which, before the amendment, would have been provided during the presentation of rebuttal evidence against the pro-IRS presumption.⁷¹

As a result, the new requirements do not provide the anticipated sword or shield allegedly necessary to protect the taxpayer from IRS abuses. Instead of assisting taxpayers as was intended, the amendment remarkably assists the IRS.⁷²

<<http://www.anchin.com>> (visited Jan. 9, 1999) (stating courts must find in taxpayers' favor on factual issues where evidence presented is equally weighted); 98 TAX NOTES TODAY 135-25 (1998) (setting forth full remarks of Senators Roth, Moynihan, Hatch, Enzi, McCain, Kyl, Grassley, Murray and Snowe in debate on Conference Report recommending bill).

⁶⁷ See <<http://tax.cch.com/tax%20news/tb1.htm>> (visited Nov. 5, 1998) (noting provision will mean relief for relatively few taxpayers and for those who wish to use it, "it may mean added complexity and expense in complying with IRS administrative requests and in litigating whether the taxpayer, in fact, qualifies"); see also <<http://www.fool.com/school/taxes/1998/taxes9807>> (visited Jan. 25, 1999) (noting "the burden of proof issue is much more sizzle than steak").

⁶⁸ See 26 U.S.C. § 7491(a)(2)(B) (1998).

⁶⁹ See Johnson, *supra* note 16, at 416; see also, Welch v. Helvering, 290 U.S. 111, 115(1933) (Cardozo, J.) (holding "Unless we can say from facts within our knowledge that these are [deductible expenses] the tax must be confirmed"); Lucas v. Kansas City Structural Steel Co., 281 U.S. 264, 271 (1930) (stating taxpayer's case fell "far short of meeting the heavy burden of proving that the Commissioner's action was plainly arbitrary"); O.S.C. & Associates, Inc. v. C.I.R., 187 F.3d 1116, 1120 (9th Cir. 1999) (stating findings are reviewed only for 'clear error'); Campbell v. C.I.R., 164 F.3d 1140, (8th Cir. 1999) (stating that taxpayer bears burden of proving that Commissioner's determination was erroneous); Yoon v. C.I.R., 135 F.3d 1007, 1012 (5th Cir. 1998) (stating clearly erroneous standard of review applies).

⁷⁰ See Christina Potter Moraski, *Proving a Negative - When the Taxpayer Denies Receipt*, 70 CORNELL L. REV. 141, 142-43 (1984) (noting both burdens rest on taxpayer); see also Tax Court R. 142A (stating "burden of proof shall be on the petitioner except as otherwise provided by statute or determined in court"). See generally Johnson, *supra* note 16, at 416.

⁷¹ See Johnson, *supra* note 16 at 416.

⁷² See Curtiss Olsen, *IRS Restructuring and Reform Act: a Slingshot for David the Taxpayer*, (visited Nov. 5, 1998) <<http://www.calcpa.org/wire/articles/wire.98.1>> (stating that this really means taxpayer still has to bear burden of proof during audit or

Substantiation and compliance require taxpayers to reveal all evidence before there is an actual shift of the burden to the IRS.⁷³ On the one hand, it is true that the taxpayer no longer must prove a negative,⁷⁴ no longer having to overcome the presumption of correctness. Rather, taxpayers must now prove the positive proposition that the deduction or claimed exemption was factually correct. Only after the taxpayer proves his allegations are not in fact fraudulent does the burden shift.⁷⁵ In other words, we now have the exact same situation, but with a different name.

On the other hand, the taxpayer loses the benefit of any surprise in the litigation. Evidence previously presented strategically at trial is now presented prior to the initiation of litigation because the taxpayer must cooperate with all 'reasonable requests' of the Secretary.⁷⁶ Furthermore, IRS agents may be tempted to use this cooperation requirement to entice taxpayers to divulge every document and weak argument prior to entering court.⁷⁷ This potentially opens the door to further abuses this legislation was designed to prevent.

Another perspective from which to view this amendment is to distinguish between a burden of persuasion and a burden of

challenges to taxpayer's deductions).

⁷³ See Olsen, *supra* note 73.

⁷⁴ See Moraski, *supra* note 71, at 142-43 (stating most courts do not force this burden upon taxpayers); George S Jackson, *To what extent has it really shifted to the IRS? The burden of proof in tax controversies*, 69 C.P.A. J. 22 (Oct. 1, 1999) (noting provision brings tax litigation in line with common law rule that burden of proof rests on government when imposing fines or penalties). *But see*, Jacob Mertens, Jr., 14 MERTENS LAW OF FEDERAL INCOME TAXATION § 50.432 (stating burden normally rests with taxpayer).

⁷⁵ See IRS Restructuring and Reform Act of 1998, Section 3001 – Burden of Proof (visited Nov. 5 & 24, 1998) <http://www.irs.ustreas.gov/plain/tax_regs/rra-3001.html> (noting "when the taxpayers meet the prerequisites for a shift in the burden of proof, the Service will have the burden to show the correctness of the Service's position, rather than rely upon the taxpayer to 'disprove' the Service's determination").

⁷⁶ See 26 U.S.C. 7491 (a)(2)(B) (limiting general rule); *see also* <http://www.irs.ustreas.gov/plain/tax_regs/rra-3001.html> (visited Nov. 5, 1998) (noting new exceptions "concentrate on communications between the Service and the taxpayer during audit, that is what requests for information were made by the Service and did the taxpayer cooperate"); George S Jackson, *To what extent has it really shifted to the IRS? The burden of proof in tax controversies*, 69 C.P.A.J. 22 (Oct. 1, 1999) (noting burden shift will increase complexities for tax advisors).

⁷⁷ See <http://www.irs.ustreas.gov/plain/tax_regs/rra-3001.html> (noting "despite explicit requirements that the taxpayer substantiate items and cooperate with the Service, taxpayers may interpret the burden of proof standard as meaning that they no longer need to do these things"); *see also* <<http://www.aicpa.org/belt/news.htm>> (visited Jan. 23, 1999) (noting many practitioners believe change would result in more intrusive IRS in examination phase due to overbroad informational requests before burden shifts).

production. Although the amendment's language speaks only to a shift in the burden of proof, the effect of this provision is similar to a shift in the burden of persuasion rather than a mere shift in the burden of proof.⁷⁸ Until now, the taxpayer bore both the burden of production and persuasion throughout the proceeding.⁷⁹ A shift under the new provision will necessitate an additional determination in advance of a final judgment.⁸⁰ A court will now have to determine not only which party has met the essential elements of its claim or defense by a preponderance of the evidence,⁸¹ but also which party has borne out its persuasive burden.⁸² That is, upon the close of the evidence, should both parties have presented evidence of equal weight, the party bearing the burden of persuasion loses.⁸³ The Senate

⁷⁸ See Tax Court Rule 142(a) ("The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter increases in deficiency, and affirmative defenses, pleaded in his answer it shall be upon the respondent"); 98 TAX NOTES TODAY 157-20 (1998) (quoting IRS Assistant Chief Counsel, Deborah A. Butler); Richard A. Carpenter, *What Accountants Need to Know About the Tax Court*, 60 TAXATION FOR ACCOUNTANTS 84, 87 (1998) (describing taxpayer's burden of proof); Theodore Tannenwald, Jr., *The Erwin Griswold Lecture: Theodore Tannenwald Jr., Before the Annual Meeting of the American College of Tax Counsel, San Antonio Texas, January 23, 1998: The United States Tax Court: Yesterday, Today and Tomorrow*, 15 AM. J. TAX POLICY 1, 14 (1998) (stating taxpayer had burden of proof).

⁷⁹ See e.g., Christina Potter Moraski, *Proving a Negative - When the Taxpayer Denies Receipt*, 70 CORNELL L. REV. 141, 142-43 (1984).

⁸⁰ See Tannenwald, *supra* note 79, at 13 (stating need for new procedure under Reconstruction Act).

⁸¹ See *Internal Revenue Service Restructuring and Reform Act of 1998*, S. Rep. No. 105-174, at 2 (1998) (stating plaintiff under prior law had burden of proving incorrect determination by preponderance of evidence); Department of the Army Pamphlet, 27-50-312, *Internal Revenue Service Restructuring and Reform Act of 1998*, ARMY LAW 28, 38 (Nov. 1998) (discussing taxpayer's burden). See generally *Danville Plywood Corp. v. United States*, 16 Ct. Cl. 584 (1989).

⁸² See 26 U.S.C. § 7491; see also <http://davidbonior.house.gov/news/press/072298_irs_reform.html> (visited Jan. 5, 1999) (stating bill was signed into law July 22, 1998 and will provide taxpayer protections); <<http://www.aicpa.org/belt/news.html>> (visited Jan. 23, 1999) (noting signing into law on July 22, 1998 of P.L. 105-206 was "victory" for taxpayers); Ryan J. Donmoyer, *With the Stroke of Six Pens, IRS Reform Became Law Last Week*, 80 TAX NOTES 415, 415-16 (1998) (discussing passage of IRS Restructuring and Reform Act of 1998); David Cay Johnston, *New IRS Law: A Guide to Shifting Burdens*, N.Y. TIMES, July 26, 1998, at 10 (discussing taxpayers' rights provisions in new tax legislation).

⁸³ See Christina Potter Moraski, *Proving a Negative - When the Taxpayer Denies Receipt*, 70 CORNELL L. REV. 141, 142-43, n.9 (1984) (defining this balancing); see also Robert A. Barker & Vincent C. Alexander, *Evidence in New York State and Federal Courts*, §300.3 and §300.4 (West 1996) (defining differences in application of burden in state and federal civil and criminal litigation); Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 244-46 (1988) (explaining difference between burden of production and persuasion); *ABA Tax News - IRS Restructuring and Reform Act of 1998* (visited Jan. 9, 1999)

Finance Committee hearings revealed that such a possibility of additional decision making was an inefficient use of judicial resources.⁸⁴

In the past, the differentiation between the burden of proof and persuasion has been evaluated in the courts and has yielded results differing from circuit to circuit.⁸⁵ For example, in *United States v. Rexach*,⁸⁶ the First Circuit reaffirmed its commitment to the presumption of correctness because it was based on prior Supreme Court precedent, the "presumption of administrative regularity; the likelihood that the taxpayer will have access to the relevant information; and the desirability of bolstering the record-keeping requirements of the Code."⁸⁷

The *Rexach* court rejected the Fourth Circuit's suggestion that the Commissioner's "assessment merely shifts to the taxpayer the burden of going forward with evidence, and disapproved the use of the term 'presumption' because of the danger, illustrated in *Clark v. C. I. R.*, of misleading courts into believing that if the taxpayer introduced evidence from which it 'could' be found that the assessment was erroneous, the burden of proof was placed on the Commissioner."⁸⁸

This question has not been resolved to date.⁸⁹ Thus, the passage of legislation seemingly erasing this conflict raises new questions. Will the courts be forced, sue to this legislation, to adopt an approach differentiating between burdens of proof and

<<http://www.anchin.com>> (stating courts must find in taxpayers' favor on factual issues where evidence presented is equally weighted);

⁸⁴ See Hearing On Legislation To Restructure And Reform The Internal Revenue Service Before The Committee On Finance, United States Senate, available at 1998 WL 8991758 (setting forth testimony of Michael I. Saltzman, White & Case, L.L.P. that "proposed section 7491 will significantly increase the scope of litigation necessitating the need for mini trials on statutory interpretation issues in order to determine if the taxpayer has met the statutory predicate to shifting the burden of proof to the Commission"); see also CCH Tax Day: Federal, *New Law Contains Changes in Tax Court Jurisdiction and Proceedings*, F98-219-017 (noting since taxpayer has burden of proving meeting all applicable conditions, may lead to initial judicial consideration of whether burden has shifted to IRS and require separate finding regarding tax issues in dispute).

⁸⁵ See *United States v. Rexach*, 482 F.2d 10, 15 (1st Cir. 1973) (rejecting Fourth circuit's adopting differences in burden of proof and burden of persuasion in tax litigation).

⁸⁶ 482 F.2d 10, 15 (1st Cir. 1973).

⁸⁷ *United States v. Rexach*, 482 F.2d 10, 15 (1st Cir. 1973).

⁸⁸ *United States v. Rexach*, 482 F.2d 10, 15 (1st Cir. 1973) (also noting that regardless of presumption, burden of proof *never* shifts).

⁸⁹ See *Senter v. Commissioner*, 70 T.C.M. (CCH) 54, 59 (U.S. Tax Court, 1995) (noting split in authority and that Supreme Court did not reconcile conflict in *United States v. Janis*, 428 U.S. 433, 442 (1976)).

persuasion? Will prior precedent such as *Rexach* and *Clark* be overturned in the Circuit Courts? Or, is another result more likely?

It is entirely possible that the almost limitless discretion inherent in the decision of whether the taxpayer has satisfied the statutory requirements will allow the courts to circumvent legislative intent. That is, despite legislative mandates, the loophole created in the provisions allowing for judicial discretion may ensure that the party bearing any burden will continue to be the taxpayer.

A. *The Effect in Court*

Considering the effect these provisions might have in court, a cautious approach to section 7491 may be the wisest. A hypothetical example may assist in evaluating this assertion. Suppose an individual unmarried taxpayer, A, has underreported his gross income. The taxpayer is first notified in writing of the deficiency.⁹⁰ As soon as A is notified of the deficiency, A can choose one of two alternate courses of action: (1) pay it and sue for a refund in District Court, or (2) petition to the Tax Court.⁹¹ Prior to the new provision, if A decided to challenge the alleged deficiency in Tax Court, A would have borne the burden of proof⁹² and thus would have been required to rebut the presumption of correctness enjoyed by the commissioner's deficiency determination.⁹³ In other words, the taxpayer would

⁹⁰ See 26 U.S.C. § 6212 (1998) (procedure for notice of deficiency); see also *Jarvis v. Commissioner of Internal Revenue*, 78 T.C. 646, 655 (1982) (holding petitioner's challenge on due process grounds failed because under 1954 Code, form of notification did not "prescribe [...] the form of a notice or the specifics to be contained therein") (citations omitted); Richard A. Carpenter, *What Accountants Need to Know About the Tax Court*, 60 TAX'N FOR ACCT. 84, 86 (1998) (describing when IRS must issue deficiency notice to inform taxpayer which notification does not have to follow any particular form).

⁹¹ See Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 256 (1988) (noting litigation options of deficiency assessed taxpayer); see also Carpenter, *supra*, note 91, at 84-86.

⁹² See <<http://www.taxchecker.com/secret8.html>> (stating "the burden is on the taxpayer to overcome the presumption that the Commissioner's determination is correct").

⁹³ See 26 U.S.C. § 7453 (1998) ("Tax Court Rule 142(a) General. The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon the respondent. As to affirmative defenses, see Rule 39"); *Moyle v. U.S.*, 22 F. Supp 432, 434 (1938) (stating that "presumption in any event would be that the Commissioner's assessment was correct"); *United States v. Walton*, 80 A.F.T.R.2d 97-8187 (W.D.N.C. 1997) (burden on

be required to prove some error or false assumption in the assessed deficiency.⁹⁴

To do so, the taxpayer/petitioner was required to put forward "substantial evidence" contrary to the Commissioner's finding. Substantial evidence has been defined as "competent and relevant evidence from which it could be found that he did not receive the income alleged [that is], evidence sufficient to support a finding that the assessment is wrong."⁹⁵ This could only have been accomplished by providing exactly the same sort of information required by the new section 7491: any records, information or documentation tending to prove that the taxpayer is correct in his asserted deduction or exclusion.⁹⁶

Commissioner is slight); Jacob Mertens, Jr. *THE LAW OF FEDERAL INCOME TAXATION*, § 50.432 (1997); Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 *HASTINGS L.J.*, 239, 257-8 (1988) (noting rebuttable presumption in favor of Commissioner); see also *Cebollero v. Commissioner of Internal Revenue*, 967 F.2d 986, 989 (4th Cir. 1992) (reaffirming presumption of correctness); *Higginbotham v. United States*, 556 F.2d 1173, 1176, n. 3 (4th Cir. 1977) (explaining prior holding that presumption of correctness is purely 'procedural', transferring "to the taxpayer the burden of going forward with evidence, but it disappears in a proceeding to review the assessment when substantial evidence contrary to the Commissioner's finding is introduced").

⁹⁴ See *Cebollero*, 967 F.2d at 992 (holding burden of proof is only met when petitioner proves Commissioner's determination was "arbitrary and excessive"); see also *Moretti v. Commissioner of Internal Revenue*, 77 F.3d 637, 643 (2d Cir. 1997) (stating "A notice of deficiency sent to a taxpayer pursuant to section 6212 carries a presumption of correctness requiring the taxpayer to prove by a preponderance of the evidence that the Commissioner's determination was erroneous" [citations omitted]); *Cox v. Commissioner of Internal Revenue*, 68 F.3d 128, 131 (5th Cir. 1995) (stating "A finding of a deficiency by the Commissioner carries a presumption of correctness, which the taxpayer may rebut by a preponderance of the evidence"); *Conti v. Commissioner of Internal Revenue*, 39 F.3d 658, 660 (6th Cir. 1994), cert. denied, 514 U.S.1082 (1995) (noting same); *Demkowicz v. Commissioner of Internal Revenue*, 551 F.2d 929, 931 (3d Cir. 1977) (noting "[o]nce the taxpayer overcomes the presumption by presenting 'competent and relevant credible evidence,' [citations omitted], which is sufficient to establish that the Commissioner's determination was erroneous, *Silverman v. Commissioner*, 538 F.2d 927, 931 (2d Cir. 1976), then the Commissioner has the burden of going forward with the evidence"); *United States v. Gerads*, 999 F.2d 1255, 1255 (8th Cir. 1993) (certificates of assessment sent to tax protesters are sufficient to withstand presumption). For an interesting look into the world of tax protesters, see "The Tax Protester FAQ", (visited Jan. 23, 1999) <<http://www.netaxs.com/~evansdb/tpfaq.html>>.

⁹⁵ *Cebollero*, 967 F.2d at 990 & 992 (explaining presumption of correctness is set aside on arbitrary and excessive grounds, wholly separate from standard used for determination of amount actually owed); see also *Higginbotham v. United States*, 556 F.2d 1173, 1175 (4th Cir. 1977) (holding "in response to a counterclaim, a taxpayer need only prove by a preponderance of the evidence that the Government's assessment is erroneous, and, once that burden is met, the Government, not the taxpayer, must prove how much the taxpayer actually owes").

⁹⁶ See *Moraski*, *supra* note 71, at 142-43 (stating most courts do not force this burden upon taxpayers); George S. Jackson, *To what extent has it really shifted to the IRS? The burden of proof in tax controversies*, 69 *C.P.A. J.* 22 (1999) (noting provision brings tax litigation in line with common law rule that burden of proof rests on government when imposing fines or penalties).

Thus, there really is no substantive or effective change in the law.⁹⁷ The taxpayer has to do exactly the same work, but within a different rubric. One may even go so far as to say that the language of section 7491 conceals the continued existence of the presumption of correctness. The case law prior to this enactment accomplished exactly the same standard of introducing "credible evidence." For example, in *Cebollero v. Commissioner of Internal Revenue*,⁹⁸ the Fourth Circuit stated that Courts of Appeal usually put the burden of persuasion onto the Commissioner after the taxpayer has proved the erroneous assessment, thereby producing exactly the same result as would this provision.

Another issue raised by this legislation is the procedural question of timing: when in the tax litigation process should the issue of burden of proof be raised? It is unclear whether the taxpayer ought to raise it initially in the first petition challenging the deficiency in Tax Court, at some earlier point in settlement negotiations,⁹⁹ or in pre-trial proceedings and memoranda. There is even the specter that it may be utilized as

⁹⁷ See Robert Dodge, *IRS Isn't Reforming Paperwork*, THE NEWS AND OBSERVER, Aug. 23, 1998, at E4 (stating burden of proof will only shift in narrow set of circumstances); Michael Hirsh, *Trumping the President*, NEWSWEEK, Nov. 3, 1997, at 49 (noting Treasury "all but eviscerated a much-touted GOP plan to shift the burden of proof in tax disputes to the IRS."); <http://www.irs.ustreas.gov/plain/tax_regs/rra-3001.html> (noting changes "should not pose an unreasonable obstruction to the Service in determining the correct tax liability [...] it is now extremely important that a thorough investigation and documentation of liability be done prior to the initiation of litigation"); Gary Klott, *Tax Reforms Offer a Sigh of Relief But No Sweeping Impact*, HOUSTON CHRONICLE, July 13, 1998, at E4 (stating many offered protections provide 'minimal' relief for taxpayers); Leandra Leder, TAX NOTES TODAY, July 20, 1998 (putting burden shift in greater context).

⁹⁸ *Cebollero v. Commissioner of Internal Revenue*, 967 F.2d 986, 990 (4th Cir. 1992) (stating *Taylor* stopped short of identifying party upon whom burden of proof rests after taxpayer has successfully shown arbitrary determination, Courts of Appeal have generally placed that burden on Commissioner) (citing to *United States v. Janis*, 428 U.S. 433, 442 (1976); *Portillo v. Commissioner*, 932 F.2d 1128, 1133 (5th Cir.1991); *Muserlian v. Commissioner*, 932 F.2d 109, 112 (2d Cir.1991); *Zuhone v. Commissioner*, 883 F.2d 1317, 1325 (7th Cir.1989).

⁹⁹ See Hearing On Legislation To Restructure And Reform The Internal Revenue Service Before The Committee On Finance, United States Senate, available at 1998 WL 8991758 (setting forth testimony of Michael I. Saltzman, White & Case, L.L.P. noting most cases are settled with IRS prior to litigation); see also Brian Henning, *Reforming the IRS: The Effectiveness of the Internal Revenue Service Restructuring and Reform Act of 1998*, 82 MARQ. L. REV. 405, 411-12 (1999) (noting generally Nathan F. Clukey, *Benefits of Shifting the Burden of Proof to the IRS are Limited*, 1999 TAX NOTES TODAY 20-136 (1999) (examining timing possibilities); Gerald A. Kafka, *Restructuring and Reforming the IRS and the CODE - Congress Takes a Quantum Leap*, 89 J. TAXATION 133, 135 (Sept. 1998) (suggesting methods for burden shifts); (1999) (state judicial interpretation of Reform Act could create uncertainty as to when burden of proof would actually shift).

a kind of affirmative defense. The choice of timing may be a tactical and perhaps strategic advantage, or alternatively, a disadvantage yielding further IRS abuses. For example, if a taxpayer immediately claims that the assessed deficiency is incorrect and places 'credible evidence' regarding the disputed liability in the petition, then the taxpayer will immediately have to prove the four requirements have been met. If this step is taken during the pre-trial discovery process, some have argued it will lead to intrusive questioning by IRS agents.¹⁰⁰ Again, the taxpayer would have to provide information and cooperate with the IRS prior to the start of the trial, divulging all material which could be the proper inquiry of the actual trial.¹⁰¹

This disclosure may lead to new preliminary questions for the courts to consider prior to the start of the actual litigation. Such mini-trials deciding the sufficiency of a taxpayer's cooperation with the IRS, or meeting a substantiation requirement, for example, will undoubtedly consume time in the already congested and overburdened court calendars.¹⁰² Furthermore,

¹⁰⁰ See Paul Cherecwich, Jr., *Letter to the Representative Archer of the House Ways and Means Committee*, Oct. 14, 1997, <<http://www.tei.org/sub15.html>> (visited Jan. 25, 1999) (stating proposal to shift burden of proof, although seemingly consistent with laudable push to enact new taxpayer bill of rights, is really misguided, because Tax Executives Institute felt proposal would lead to either more intrusive IRA or completely ineffective one as enforcement efforts would intensify due to agency endeavors to sustain heightened burden); see also Ryan J. Donmoyer, *Roth Signals Expansion of IRS Restructuring Legislation*, TAX NOTES TODAY (1998) (suggesting burden shift will make IRS more intrusive). See generally Amy Hamilton, *Finance Committee Defines Burden of Proof, Attorney Client - Provisions*, TAX NOTES TODAY (1998) (elaborating on burden shift); Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L. J. 239, 280 (1988) (stating shifting burden of proof could lead to greater governmental intrusion into individuals' affairs).

¹⁰¹ See 10/26/97 Face the Nation Transcript, 1997 WL 7753795, (stating "experts say that if the burden of proving cases shifts to the agency, it'll be forced to require even more information from taxpayers [making IRS] even more annoying [and resulting] in a loss of revenue and create a whole new class of tax cheaters"). See generally Ann Reilly Dowd, *Win More at the New IRS*, MONEY, January 4, 1998, at 82 (stating burden shift will cause IRS to intrude into taxpayers' lives to collect evidence); Jerry A. Kasin, *Why Burden of Proof Rules will Affect Valuation Issues*, TAX NOTES TODAY (1998) (describing taxpayer cooperation); Sheryl Stratton, *Burden Shifting - A Bill of Goods?* TAX NOTES TODAY (1998) (describing inquiry process).

¹⁰² See Alice G. Abreu, *Congress Set to Reconvene*, (visited Jan. 25, 1999) <<http://www.toplin.com>> (noting shift of burden of proof to clog already overburdened tax court because as taxpayers may 'head straight to court where they know the IRS must prove its case'); see also Robert Edwin Davis, *Tax Law Gets Trendy*, TEXAS LAWYER, Feb. 1, 1999 (stating Tax Courts' dockets decline to under 26,000 cases); James Toedtman, *Whose Side is Tax Bill On?*, NEWSDAY, May 11, 1998, at C09 (quoting Chief U.S. Tax Court Judge Mary Ann Cohen that burden of proof shift will create additional layers of questions for courts to decide, and thus delaying justice); *IRS Describes Burden of Proof Provisions in TBOR3*, 1998 TAX NOTES TODAY 52-62 (1998) (stating judicial

taxpayers would be forced to show their hand while the IRS can sift through the material without a concomitant obligation to provide all it has to the taxpayer.¹⁰³

The answer to this perplexing timing question has been addressed in neither the legislative history nor in the current Tax Court Rules.¹⁰⁴ In fact, Judge L. Paige Marvel noted that the "court must decide and there may be different answers for different cases."¹⁰⁵ This admitted possibility of disparate treatment of taxpayers in different cases seems to further remove the much lauded goal of the reform: providing an evenhanded chance to a taxpayer to win a suit against the IRS.¹⁰⁶ If the Tax Courts cannot, and the legislature will not, implement a uniform system for its application, perhaps it is wise to revise section 7491 to specify exactly when, where and how the provision shall apply.

determinations of whether burden of proof has been met could add to length of trials).

¹⁰³ See Hearing On Legislation To Restructure And Reform The Internal Revenue Service Before The Committee On Finance, United States Senate, available at 1998 WL 8991758 (setting forth testimony of Michael I. Saltzman, White & Case, L.L.P. noting § 7491 will significantly increase scope of litigation, necessitating need for mini-trials on statutory interpretation issues to determine if taxpayer has met statutory predicate to shifting burden of proof to Commissioner). See, e.g., Feb. JOURNAL OF ACCOUNTANCY, available at 1998 WL 11641842 (noting President of Tax Executives Institute thought § 7491 was positive force to ensure party with facts does not prevail simply by hiding records, and yet creates more intrusive IRS which would have to "intensify its enforcement activities to sustain its heightened burden"); see also Mike McNamee, *A Kinder Gentler IRS?*, BUSINESS WEEK, Feb. 1, 1999, at 128E6 (stating that before cases can go to court, must pass through all levels of IRS appeals). But see, Jimmy Martens, *A Kinder Gentler Tax Collector*, TEXAS LAWYER, Feb. 1, 1999, at 20 (stating that shift in burden would allow tax lawyers to settle cases more easily and on terms more favorable to taxpayers because it "creates a litigation risk for the IRS that was previously borne by taxpayers.")

¹⁰⁴ See Nathan E. Clukey, *Benefits of Shifting Burden of Proof to the IRS are Limited*, 1999 TAX NOTES TODAY 20-136, (1999) (stating legislative history to § 7491 is silent concerning when burden should shift); Scott E. Vincent, *IRS Restructuring and Reform Act of 1998*, 54 J. MO. B. 251, 251 (1998) (stating burden of proof rules will apply to proceedings arising after date of enactment); *Internal Revenue Service Restructuring and Reform Act of 1998*, 1998 -Nov. ARMY LAW 28, 38 (1998) (stating change in burden of proof applies to judicial proceeding, not audits and investigations).

¹⁰⁵ See Robert T. Zung, *Tax Court : Judge Outlines Changes Facing Court By IRS Restructuring Legislation*, 199 DTR G-2 (1998). Judge L. Paige Marvel's comments also noted petitioners have already tried to utilize provisions without checking the effective date.

¹⁰⁶ See Jeff A. Schnepfer, *Restructuring and Reforming the Internal Revenue Service*, USA TODAY MAGAZINE, Sept. 1, 1998, at 5 (stating purpose of Act to provide 'fair and equitable treatment' of taxpayers); *TEI Offers Suggestions on Corporate Taxpayers' Problems*, 98 TAX NOTES TODAY 246-13 (1998) (stating principle of treating taxpayers equitably and fairly ultimate driving force behind act); *Grassley Statement on IRS Reform Legislation*, 98 TAX NOTES TODAY 87-22 (1998) (stating legislation puts taxpayer on 'more equal footing' with IRS).

IV. PUBLIC OPINION AND COMMENTARY

Public reception to the measure both before and after its enactment further support the theory that section 7491 requires revision. Prior to the enactment of section 7491, the Senate hearings received scores of testimonials from interested practitioners and individuals.¹⁰⁷ Although some lauded the efforts of the Congress¹⁰⁸ in removing the burden of proof from the shoulders of the American public,¹⁰⁹ the measure was praised mostly as part of the entire reform effort to remove the stigma from the workings of the agency, whose agents, we were told, had abused their authority to a high degree.¹¹⁰ Some simply admitted

¹⁰⁷ See *Burden-of-Proof Provision Could Spur Disputes, Tax Court Chief Judge Says*, 98 TAX NOTES TODAY 12-58 (1998) (setting forth Chief Judge Mary Ann Cohen's recommendations to Senate Finance Committee); see also CCH Tax Day: Federal, F98-275-005 (10/2/98) (noting provisions may mean little to un-represented taxpayer); 2/1/98 J. Acct. (Pg. Unavail. Online), 1998 WL 11641842 (noting President of Tax Executives Institute said section 7491 was positive force to ensure party with facts does not prevail simply by hiding records, and yet creates more intrusive IRS which would have to "intensify its enforcement activities to sustain its heightened burden"); Janet Hook, *Senate OKs Ill to Revamp IRS*, L.A. TIMES, May 8, 1998, at A1 (stating Senator Frank H. Murkowski's opinion that there was no difference between proposed change and status quo); Lance Gay, *IRS Promises to End Abuses*, MILWAUKEE J. & SENTINEL, May 2, 1998, at 3 (stating Senator Phil Gramm's view that changes mirror status quo).

¹⁰⁸ See 98 TAX NOTES TODAY 135-25 (Doc 98-22333) (1998) (setting forth full remarks of Senator Roth, praising tireless efforts of Senate and Houses in the passage of the bill); Senator Daschle (R-SD) 7/9/98 Gov't Press Releases (Page Unavailable on Line) 1998 WL 7325143 (thanking tireless bipartisan efforts in passage of enactment); see also *A Good Start*, THE BUSINESS JOURNAL OF MILWAUKEE, May 18, 1998, <<http://www.amcity.com/milwaukee/stories/1998/05/18/editorial1.html>> (visited Jan. 25, 1999) (commenting that Senate's bill is great beginning, but requires downsizing of Code). See, e.g., *Current and Quotable*, 77 TAX NOTES 619, 619-24 (1997); *Tax Profs Urge Rejection of Burden-of-Proof Shift*, 78 TAX NOTES 755-758 (1998) (letter from 97 tax law professors to member of Senate Finance Committee).

¹⁰⁹ See 98 TAX NOTES TODAY 136-22 (Doc. 98-22334) (1998) (setting forth full remarks of Senator Dodd: "Today, when someone is accused of a crime like bank robbery, they're presumed innocent until proven guilty. Yet, if the IRS says you didn't pay enough taxes, you're presumed guilty until proven innocent. That, Mr. President, is wrong.") (See also remarks of Senator Murkowski: "when American citizens go into a court, they should be presumed innocent, not guilty until they can prove their innocence. That principle is enshrined in our Constitution and must apply in tax cases as well as any other cases. Now it will"); see also, Editorial, *Improved Revenue Service?* BOSTON GLOBE, Oct. 23, 1997, at A24 (noting s.7491 is positive measure which should be enacted as long as it "requires taxpayers to cooperate by producing necessary documents"); <<http://www.toeniescpa.com>> (visited Jan. 25, 1999) (opining that where "taxpayer has shifted the burden of proof to the IRS, the Service appeals officer may be more likely to settle in favor of the taxpayer since it may seem more likely that he may prevail in court"); Sabol, *supra*, note 46, at 264 (discussing speed of Congressional Approval); Robert Burns, *Clinton Joins GOP in Attacking IRS*, PORTLAND OREGONIAN, May 3, 1998, at A18 (stating Clinton wanted swift action).

¹¹⁰ See "Taxpayer Horror Stories" <<http://www.senate.gov/rpc/releases/1998/tax-horro.htm>> (visited Jan.23, n1999) (listing such stories); Dan Thomasson, "Internal Revenue Service - It's Past Time to Reform Tax Agency", DAYTON DAILY NEWS, Sept. 30,

they didn't understand the provision but felt the need to discuss it anyway.¹¹¹ Opponents to Section 7491 denounced the shift as an ill-conceived plan which would effectively cause more harm than good.¹¹²

1997, at 7A (describing friend's tale of IRS audit in which decision of his liability had been made prior to audit); see also Gary Klott, *Your Taxes*, 1998 WL 2624217 (discussing Republican proposals); Tim Hutchinson, *Toss Out Tax Code, Start Over*, USA TODAY, May 4, 1998, at 11A, (advocating complete revamping of tax code).

¹¹¹ See Comments of Rep. Taylor (Mississippi) during the House Conference Committee, H5361 ("Mr. Speaker, I have got to admit that portions of this bill leave me somewhat perplexed, while I agree with most of it."); Stephen Winn, *The Enemy Is Us*, KANSAS CITY STAR LEDGER, April 19, 1998, at L1 ("Here we go again!"); *Let's Revamp the Tax Code*, WALL ST. J., April 15, 1998, at A22 (discussing William G. Gale's opinion that current system should be maintained but corrected).

¹¹² See 98 TAX NOTES TODAY 135-25 (1998) (setting forth full remarks of Senators Moynihan, who stated his concern that "the provision will result in more intrusive IRS audits, create additional complexity and litigation and create confusion for taxpayers and the IRS as to when an issue needs to be resolved in court and when the burden has shifted."); IRS Restructuring and Oversight Hearings Before the Senate Committee on Finance, available at 1998 WL 8991359 (setting forth testimony of Fred T. Goldberg, Assistant Secretary for Tax Policy and member of National Commission on Restructuring IRS: "In our system, taxpayers have the information necessary to prepare their returns. The IRS doesn't. Under these circumstances, it only makes sense to have the taxpayer prove up his or her case. The current rules reflect this reality, they have nothing to do with treating taxpayers as guilty until proven innocent."); IRS Restructuring and Oversight Hearings Before the Senate Committee on Finance, available at 1998 WL 8991357 (1998) (setting forth Donald D. Alexander's testimony that shift in burden of proof is 'unwise' and raising issue of endurance of rebuttable presumption of IRS correctness); IRS Restructuring and Oversight Hearings Before the Senate Committee on Finance, available at 1998 WL 891376 (setting forth testimony of Stefan F. Tucker (Chair of ABA Taxation Section) that "the Tax Section continues to oppose any blanket shift in the burden of proof that would apply to all tax disputes. We have expressed concern that such a radical shift would provide a disincentive to adequate taxpayer record keeping; would result in some taxpayers being less forthright in preparing and filing their returns; would increase the incidence of taxpayers taking overly aggressive positions on their returns; and would encourage the IRS to be more aggressive in collecting information from taxpayers and third parties in the administrative audit stage. In our view, enactment of a proposal to shift the burden in all cases would have a significant impact on tax administration and compliance"); IRS Restructuring and Oversight Hearings Before the Senate Committee on Finance, available at 1998 WL 8991358 (setting forth Sheldon S. Cohen testimony that "The burden of proof idea in the House bill is a mistake. It won't help taxpayers and it will confuse the tax system. Everyone knowledgeable about the tax system will tell you that the taxpayer has control of the necessary information so he should have the obligation to produce the required information to justify his deduction. If the IRS gets concerned about the burden it will have, then it will intensify the audit in order to avoid the burden of proof issues; that is not what you want. Taxpayers will misunderstand these provisions and will sit back and say to the IRS: prove I am wrong," without cooperating in the audit. Thus, they will think they have new rights which may well prove illusory. It seems to be a bad idea"); see also IRS Restructuring and Oversight Hearings Before the Senate Committee on Finance, available at 1998 WL 8991760 (setting forth testimony of Nina E. Olson, Exec. Dir. CLTP, that burden of proof provision is "unhelpful and quite possibly harmful to low income taxpayers"); IRS Restructuring and Oversight Hearings Before the Senate Committee on Finance, available at 1998 WL 8991361 (Douglas C. Burnette (President of National Society of Accountants) testifying bill is "unlikely to have any significant impact on most tax cases" but that it may lead to "more intrusive audit[s]"); IRS Restructuring and Oversight Hearings Before the Senate Committee on Finance, available at 1998 WL 8991376

The main pre-enactment arguments against the shift were: (1) issue confusion in that shifting the burden of proof does not perfect the IRS and (2) giving the taxpayer a false sense of security.¹¹³ It was argued that the provision was widely misconstrued as eradicating all substantiation and record keeping requirements, when in fact, it did quite the opposite. Others simply wanted Congress to pass the measure as quickly as possible,¹¹⁴ or to reform the entire tax code¹¹⁵ or to reform the congressional methodology of reform.¹¹⁶ After the enactment,

(setting forth testimony of Michael E. Mares (Chair AICPA) that AICPA did not support amendment). Compare, CCH Tax Day: Federal, *IRS Chief Counsel Describes Fundamental Changes Made at IRS, Challenges that Lie Ahead*, F98-271-006, (noting IRS plans to 'play down the middle'); James W. Colliton, *New Burden of Proof Portends New Tax Burden*, CHICAGO DAILY LAW BULLETIN, Apr. 30, 1998 at 6 (calling 7491's provisions "really terrible idea" because it will allow taxpayers to cheat, and not keep records); <<http://scratch.abanet.org/tax/irs926.html>> (visited Jan. 25, 1999) (ABA Section of Taxation opposing H.R. 367's burden of proof shift because allows more evasion, would yield more intrusive audits, and cost of enforcement would "significantly complicate the fiscal condition of the United States").

¹¹³ See Newsline, *New Law Revamps IRS But Doesn't Stop There*, 89 J.TAX 67, 67 (1998) (stating result of changes are unforeseen, uncertain, and some taxpayers 'are bound to be misled and assume the burden is on the Service from the get-go and not just in court', and further that misunderstanding may encourage greater noncompliance by those taxpayers already so inclined); Colliton, *New Burden of Proof Pretense New Tax Burden*, CHI. DAILY L. BULL., April 30, 1998 at 6 (stating shift is "a really terrible idea" because it will allow unscrupulous filers to take advantage of system, will encourage people not to keep records, which will lead to guessing on returns, and will in turn foster a more demanding IRS); Robert Dodge, *IRS Agents May Require More Data to Build Their cases* (visited Jan. 25, 1998) <http://www.dallasnews.com/business-nf/biz38.html> (warning against taxpayer's failure to maintain records); Jon Forman, *Despite Rhetoric, New IRS Law Changes Little*, J. REC. (Okla. City), July 23, 1998, available at 1998 WL 11955580 (noting provision may actually cause more difficulty and more expense to resolve disputes with IRS); Michael B. Styles, *Letter to Senator Roth from the Federal Managers Association*, (visited Jan. 25, 1999) <<http://www.fpmi.com/FMA/IRSltr.html>> (stating shift will cause unintended negative consequences because more taxpayers will be tempted to claim non-deductible expenses, without fear of repercussions, which will cost government revenue); John J. Tighe Jr., *Congressional Reform Of The IRS*, N.Y.L.J. Sept. 17, 1998 at 3 (calling § 7491 'the most overrated revision' and stating Congress had 'failed to deliver on its promises of sweeping reform').

¹¹⁴ See Editorial, *Another View*, CINCINNATI ENQUIRER, May 10, 1998, at B02 (stating it is "time for the public flagellation to end and the reform to begin"); see also Carpenter, *supra* note 84, at 86 (discussing procedure for petitioning tax court); Mario Kopin, Arlene Hibscheiler, *Strategies for Handling IRS Assessments*, 26 TAX'N. FOR LAW. 345 (1998) (discussing various venues available to taxpayer in tax dispute); Ralph Vartabedian & Jonathan Peterson, *Clinton Signs Bill That Aims to Reform IRS*, LOS ANGELES TIMES, July 23, 1998, at A16 (quoting former IRS Commissioner Fred Goldberg as saying bill brings IRS back in line with peoples' expectations).

¹¹⁵ See Editorial, *The Best IRS Reform? Simplify the Tax Code*, ROANOKE TIMES AND WORLD NEWS, Jan. 29, 1998, at A8 (noting complexity of code and that Congress should "unravel the Gordian knot"); TELEGRAM & GAZETTE (WORCESTER), July 15, 1998, at A8, (arguing reform is not complete without tax code simplification). See generally Daniel J. Mitchell, *Get Rid of U.S Tax Code and Start Over*, HOUS. CHRON. Mar. 15, 1998, at 1 (arguing for reform of entire tax code).

¹¹⁶ See Paul C. Light, *Reform Government? Again?* WALL STREET JOURNAL, Aug. 29,

public sentiment ranges just as broadly.¹¹⁷

Instead of allowing such issue confusion and public misperception of the measure in an election year,¹¹⁸ perhaps IRS reform is better served by looking to other, perhaps more truthful, concrete and effective solutions. There have been proposals to revamp the current system,¹¹⁹ to scrap it¹²⁰ or to impose a simple flat tax or value added tax.¹²¹ Such proposals would admittedly provide a simpler framework in which to gauge tax liabilities.¹²² Instead of apportioning massive amounts of

1997, at A10 (arguing Congress should adopt one theory of reform and use it consistently to dredge Internal Revenue Code).

¹¹⁷ See "Issue: IRS Restructuring" (visited Nov. 6, 1998) <<http://www.ntma.gr/irsrest.htm>> (stating average taxpayer will not directly benefit from changes brought by legislation); *IRS: Burden of Proof Shift Leads Taxpayers to Error, Experts Say*, 204 DTR G-9 1998, Oct. 22, 1998 (quoting various tax law practitioners' concerns that provision will lead to more costly and intrusive discovery and that taxpayers will believe they no longer have to keep records); see also Jeff A. Schnepfer, *Restructuring and Reforming the Internal Revenue Service*, USA TODAY, Sept. 1998, at 15 (stating Reform Act of 1998 expanded taxpayer rights and was major step in improving our system of taxation); Howard W. Wolosky, *Finding Gold in the Tax Law*, PRACTICAL ACCOUNTANT, Sept. 1998 (quoting Dick Brennan, senior tax attorney and partner at large tax firm and former Chief Counsel for IRS, that shift in burden of proof is a 'big detriment').

¹¹⁸ See Editorial, *After IRS Reform, You Will Still Pay Taxes*, BALTIMORE SUN, July 14, 1998 at 8A (noting reform bill was 'oversold' in election year). See generally Jeff Schnepfer, *Can the IRS Truly Be Reformed?*, USA TODAY, Jan. 1998 at 29 (noting that death and taxes are differentiated by taxes becoming "more complicated and more painful every time Congress meets"); David Warner, *Not-So Great Expectations*, NATION'S BUSINESS, Jan. 1998, at 26 (stating in election years, members of both parties endeavor to please voters).

¹¹⁹ See John E. Chapoton, *The Tax Man's Burden*, NEW YORK TIMES Oct. 24, 1997, available at <<http://www.vinson-elkins.com/taxburden.html>> (visited Jan. 25, 1999); Gale William, *Why Are Taxes So Complicated? And What Can We Do About it?*, BROOKINGS REVIEW, Dec. 1998, at 36 (advocating simpler tax system). See generally Kenneth W. Gideon, *Overhaul of Reporting System for Widely Held Partnerships Requires Legislative Action*, TAX NOTES TODAY (1990) (elaborating on burden shift); Fred T. Goldberg, Jr., *Goldberg Defends President's 1998 IRS Budget Proposal Held Partnerships Requires Legislative Action*, TAX NOTES TODAY (1990) (describing different revamping strategies).

¹²⁰ See Andrew Ferguson, *Goodbye, Brave Newt World*, TIME, Nov. 16, 1998, at 134 (noting republicans want to 'scrap' entire Federal tax code by 2000); *Tax Pros Say Simplify Code*, JOURNAL OF ACCOUNTANCY, Mar. 1, 1999, at 23 (noting poll of tax practitioners resulted in forty per cent advocating 'radical change' to tax system and at least nine percent advocating replacement of tax code with national sales tax); *New Member Biographies for Wisconsin*, THE NATIONAL JOURNAL, Nov. 7, 1998, at 2654 (quoting republican state representative Mark Green as proposing eradicating current tax code).

¹²¹ See CCH Tax Day: Federal, Aug. 13, 1998 (quoting Senator Kerrey (D-Neb) as supporting replacement of income tax with consumption tax); Michael J. McIntyre and C. Eugene Steuerle, *Federal Tax Reform, a Family Perspective*, 96 TAX NOTES TODAY 135-21 (1996) (discussing benefits of flat tax); Lexington, *Steve Forbes and His Victims*, THE ECONOMIST, Jan. 30, 1999, at 31 (stating Steve Forbes advocates replacing current tax code with seventeen per cent flat tax); Sijbren Cnossen, *Administrative and Compliance Costs of the VAT: A review of the Evidence*, 94 TAX NOTES TODAY 124-31 (1994) (discussing implications of VAT).

¹²² See Carl Rowan, *Clinton IRS 'Reform' Doesn't Gauge American Mood*, CHICAGO

money to pass ineffective legislation,¹²³ perhaps allocating such resources to the agency already in place to ensure that well-trained staff with the proper technology will get the job done, and perhaps more effectively.¹²⁴

CONCLUSION

Despite the noble efforts of many legislators and taxpayer advocates, the Internal Revenue Reform and Restructuring Act of 1998 has unfortunately failed to provide the results it promised. The Act's prerequisites have the effect of enshrining the pro-IRS presumption it sought to eradicate and further complicate tax litigation. Enacting rules clarifying section 7491's application seems to be the first necessary step toward continued reform. It is clear that such efforts at reform are a positive force in our system of taxation and that further efforts must continue into the future to provide an even playing field between the government and those who pay for the government – the taxpayers.

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SUN TIMES, Oct. 12, 1997, at 45 (noting Congressman Dick Armey leads group of Republicans proposing 20% flat tax and that Congressman Billy Tauzin leads group proposing 15 % sales tax). *See generally* William H. Miller, *The New Congress*, INDUSTRY WEEK, Jan. 4, 1999 at 29 (noting national federation of Independent Businesses wants to eradicate current tax Code). *But see*, Margaret Milner Richardson, *Can We Really Simplify Taxes*, CFO: TIME MAGAZINE FOR SENIOR FINANCIAL EXECUTIVES, Dec. 1998 at 14 (proposing sophisticated U.S. economy requires complexity of our tax code).

¹²³ *See, e.g.*, loss of billions of dollars trying to update IRS computer systems that failed.

¹²⁴ *See e.g.*, *Statement of Charles O. Rossotti, Commissioner of Internal Revenue Before the Senate Finance Committee*, Jan. 28, 1998, IR-98-3, available at 1998 WL 29310 (explaining procedures and plans to change IRS); Use of Enforcement Statistics and Performance Measures at the IRS, IRS News Release FS -98-16, Sept. 1998, 1998 WL 656564 (noting internal audits have shown existing performance measures did raise productivity at cost of proper treatment of taxpayer); New Program to Improve Taxpayer Treatment and Service, IRS News Release IR-98-18, (visited Jan. 25, 1999) <<http://www.irs.gov/welco>> (noting changes in IRS to make more taxpayer friendly environment); Rita A. Cavanagh, *Sweeping Legislation Give the IRS a Friendlier Face*, (visited Jan. 23, 1999) <<http://www.riatax.com/journals/pts/ptsart.html>> (noting new changes in IRS organizational structure); *see also* Amy Hamilton, *News Analysis: IRS On Verge Of A Breakthrough, Or A Nervous Breakdown*, 1999 TAX NOTES TODAY 108-1 (1999) (noting nominations to oversight board were not approved);

Declaration of Taxpayer Rights, Publication 1, (visited Jan. 25, 1999) <http://www.irs.ustreas.gov/plain/forms_pubs/pubs/p101.htm> (listing newest version which includes right to professional and courteous service).

